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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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NAVIGAZIONE LIBERA TRIESTINA, a corpora-  
tion, Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Upon Appeal From the United States District Court  
for the Western District of Washington,  
Northern Division

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Brief of Appellant

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STATEMENT

This is an appeal from a decree of dismissal (Tr. 26) dismissing plaintiff's amended complaint (Tr. 13). The dismissal is based upon a demurrer inter-

posed by the defendant to plaintiff's amended complaint on four grounds (Tr. 24).

At the hearing before the lower court, the demurrer was overruled as to the first ground and sustained on the ground that the amended complaint failed to state facts sufficient to constitute a cause of action, the second and third grounds not being considered. (Tr. 25.) Plaintiff was allowed seven days to amend its amended complaint (Tr. 26) which plaintiff elected not to do, and subsequently an order of dismissal was entered based upon the said order sustaining defendant's demurrer on the fourth ground above stated from which order of dismissal plaintiff now appeals.

## STATEMENT OF FACTS

This is a case brought by plaintiff to recover from defendant the sum of \$2000.00 with interest, which said sum was paid by plaintiff to defendant under protest, as a fine imposed by the Department of Labor for an alleged violation by the plaintiff of Section 20(a) of the Immigration Act of May 26, 1924 (8 U. S. C. A. 167(a) ) which said failure is alleged to consist of the failure of the master of the motorship "Cellina," a vessel owned and operated by the plaintiff to detain on board said vessel two alien seamen, to-wit: Domenico Lachich and Constantino Camalich,

until inspected by the immigration officer. A fine was assessed and paid under protest in the sum of \$1,000 for each of said alien seamen under the provisions of the statute. (8 U. S. C. A. 167(a).) This action is brought in the United States District Court under Section 24, paragraph 20, of the Judicial Code (28 U. S. C. A. 41 (20) ) as being one "founded upon \* \* \* any law of Congress."

This case is before this court on the question of the sufficiency of the complaint to state facts constituting a cause of action.

## ASSIGNMENTS OF ERROR

(Tr. 29)

Comes now the plaintiff and appellant in the above cause, and in connection with its petition for appeal in said cause, assigns the following errors, which plaintiff and appellant avers occurred in the proceedings, orders and judgments of the above court in this said cause and upon which it relies to reverse the judgment entered therein as appears of record.

### I.

The above District Court erred in sustaining defendant's demurrer for the reason that plaintiff's

amended complaint does state facts sufficient to constitute a cause of action against the defendant and the ground for said demurrer is not well taken.

## II.

The above District Court erred in dismissing plaintiff's action for the reason that said final judgment of dismissal is based upon the court's erroneous ruling sustaining said demurrer of the defendant, and said judgment of dismissal is erroneous for the same reason.

WHEREFORE, plaintiff and appellant prays that the judgment of said District Court be reversed.

## ARGUMENT

1. *Plaintiff's amended complaint does state facts sufficient to constitute a cause of action against the defendant.*

The statute involved herein (8 U. S. C. A. 167-a) provides as follows:

“The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain



such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of \$1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs."

The plaintiff in this action sues to recover back a fine which was arbitrarily and illegally imposed and collected by the defendant under the above statute. Paragraph 9 of plaintiff's amended complaint contains in part the following (Tr. 22):

"\* \* \* The plaintiff herein has paid to the defendant herein the sum of \$2,000, said sum being paid under protest in order to obtain the clearance of said vessel \* \* \*. \* \* \* Plaintiff paid to Henry Blackwood as Acting Collector of Customs at the Port of Seattle, Washington, under duress and protest, the said fine in the sum of \$2,000 arbitrarily and illegally imposed and collected as aforesaid, and that although demand has been made upon the United States of America, and the Department of Labor and Henry Blackwood, Acting Collector of Customs at the Port of Seattle, Washington, for the return of said sum of \$2,000, said defendant has wholly failed, refused and neglected to return the same or any part thereof to the plaintiff, and the whole of said sum is now due and owing to the plaintiff from the said defendant."

Such an action is provided for under the provisions of the Tucker Act (28 U. S. C. A. 41 (20) ), and under the established cases.

*Dooley vs. U. S.* 182 U. S. 222.

*Campagne Generale Transatlantique vs. U. S.*,  
21 Fed. 2nd 465, 26 Fed. 2nd 195.

Plaintiff alleges that the immigration authorities and Inspector Rafferty did not inspect and/or examine members of the crew of said motorship "Cellina" as required by Section 20 of the Immigration Act of May 26, 1924 (8 U. S. C. A. 167(a) ) at the time that the blanket detention order detaining all members of the crew was issued, and that the said detention order was arbitrary and illegal and of no force and effect. Paragraph 8 of plaintiff's amended complaint contains the following material allegations (Tr. 19) :

"That the members of the crew and seamen of the motorship "Cellina" were not given a fair or any hearing prior to the issuance of the said arbitrary blanket detention order detaining all of the members of the crew of the said vessel thereon; that the said members of the crew and the seamen of the said vessel and more particularly the said Domenico Lachich and Constantino Camalich were not examined by the said Inspector Rafferty as to their right to enter and/or land in the United States of America and more particularly the Port of Seattle, Washington, nor were they or any of them properly physically examined by the medical examiners as required by the laws of the United States of America, and more

particularly the Immigration Act of May 26, 1924, and that the said blanket detention order heretofore issued did not name the members of the crew of said vessel sought to be detained thereon, nor did it name the said Domenico Lachich and Constantino Camalich \* \* \* ; nor were the said Domenico Lachich and Constantino Camalich given an opportunity to prove to the United States immigration authorities that they and each of them were bona fide seamen, free from objectionable disease and entitled to land in the United States under and by virtue of the provisions of the laws of the United States and more particularly Section 3 of the Act of May 26, 1924. \* \* \* They were ordered detained aboard said vessel without proper inspection or examination and without being given an opportunity to prove that they were bona fide seamen as contemplated by the laws of the United States. \* \* \*

Plaintiff's complaint further alleges (Tr. 21 and 22) that thereafter the said two alien seamen escaped from the vessel and that the immigration authorities and/or Acting Collector of Customs at the Port of Seattle served notice of the imposition of a fine upon the master of the said vessel for failure to detain said alien seamen on board until inspected and demanded a bond which plaintiff posted in the sum of \$2500.00. An appeal was lodged with the Department of Labor for a remission of the said fine which was denied and the fine arbitrarily levied against the plaintiff was imposed by the Department of Labor without justification and without authority and arbitrarily. This sum was paid by the plaintiff

under protest and in order to obtain the clearance of said vessel from the Port of Seattle.

Paragraph 9 of the plaintiff's amended complaint contains the following (Tr. 21 and 22) :

“\* \* \* That thereafter and in accordance with demand made as aforesaid, plaintiff herein filed a proper bond in the sum of \$2500.00 conditioned that should an appeal be taken to the Department of Labor at Washington, D. C., and denied, and the fine finally levied, the sum of \$2,000 would be paid. That thereafter an appeal was lodged with the United States Department of Labor, but the fine heretofore arbitrarily levied by the said Department of Labor was then and there imposed without justification and without authority under the Act of Congress of May 26, 1924, Chapter 190, Section 20 (a-c) 43 Statutes 164, and the plaintiff herein has paid to the defendant the sum of \$2,000, said sum being paid under protest. \* \* \*”

In the recent case of *Campagnie Generale Transatlantique vs. U. S.*, 21 Fed. 2nd 465, decided by the the United States District Court for the Southern District of New York, and affirmed in 26 Fed. 2nd 195 by the Circuit Court of Appeals for the Second Circuit, the plaintiff sought to recover sums imposed as fines by the Commissioner of Immigration and paid under protest. The facts and law involved in this case are similar to the case before this court.

The second and third causes of action in the above case alleged the fines to have been imposed under

Section 16 A and B of the Immigration Act of May 26, 1924, 8 U. S. C. A. 216. The plaintiff further alleged that no statute of the U. S. had been violated and that the act of the Secretary of Labor in imposing the fine was without lawful authority and arbitrary, and that the defendant received the said money to the use of the plaintiff. The lower court overruled defendant's motion to dismiss and found for the plaintiff.

Before the Circuit Court of Appeals (26 Fed. 2nd 195), the plaintiff in error contended that the claims were not founded upon a law of Congress and the action, therefore, could not be maintained under the Tucker Act (28 U. S. C. A. 41 (20) ). The court said:

"The judgment below was granted because the fines were improperly or arbitrarily retained, when under Section 16 (c) of the Act of 1924 the Secretary of Labor should have refunded the sums paid \* \* \*. Therefore, the right of recovery is based upon a law of Congress."

On the question of the duty of the Secretary of Labor to refund penalties improperly imposed, the court said:

*"It was the duty of the Secretary of Labor to refund the penalties if they were improperly imposed. That they were wrongly imposed is established \* \* \*. Arbitrary action in acting or refusing to act would not defeat the defendant in error's claim to a refund.*

Keeping the fine without conforming to Section 16, that is, without fairly passing on the issue presented to him, would be arbitrary, and such action by the Secretary is pleaded and for the purpose of the motion to dismiss is admitted.

“The defendant in error assented to the deposit or payment, but under protest and its receipt by the Collector was in no way tortious.”

In regard to the plaintiff's right of recovery in this case, the court distinguishes it from the case of *U. S. vs. Holland American Lijn* (254 U. S. 148) where “immigration officials were acting wholly without law to authorize their acts.” The Circuit Court said in speaking of the case before them (26 Fed. 2nd 195) :

“But here the right of recovery is based upon the obligations imposed under Section 16, upon the Secretary of Labor, and the defendant in error seeks to recover because of the arbitrary action in his failure to act upon the evidence which justified his refunding the fines.”

See, also:

*Dooley vs. U. S.*, 182, U. S. 222.

*Gilmour vs. Newton*, 270 Fed. 332.

Our present case involves a decision by the Secretary of Labor imposing a fine upon the plaintiff based upon the provisions of a statute of the U. S. (8 U. S. C. A. 167 (a) ). The plaintiff alleges this said statute was not violated by reason of the improper inspec-

tion and examination, and the blanket detention order detaining all of the members of the crew based upon the said improper inspection and examination. The question involved is a question of law as to the construction of a statute, to-wit: 8 U. S. C. A. 167(a). This question of law was arbitrarily decided by the Secretary of Labor resulting in the refusal to refund the fines and this action by the Secretary of Labor is, therefore, reviewable by the courts.

In the case of *U. S. vs. Laughlin*, 249 U. S. 440, the court held that the intent of Congress was that the Secretary should have exclusive jurisdiction only to determine disputed questions of fact and that as in other administrative matters his decision upon questions of law was reviewable by the courts.

In the case of *Medbury vs. U. S.*, 173 U. S. 492, the court held that the court of claims had jurisdiction of an action to recover excess payments for lands within the limitation of a railroad grant. The court said:

“We cannot suppose that Congress intended in such cases to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in the court of claims for none is given in the act which creates the right \* \* \*. If there were any disputed questions of fact before the Secretary, his decision in regard to those matters would probably be conclusive and would not be reviewed in any court, but where as in this case there is no dis-

puted question of fact, and the decision turns exclusively upon the proper construction of the Act of Congress, the decision of the Secretary refusing to make the payment is not final, and the court of claims has jurisdiction of such a case."

That the blanket detention order was unlawful and contrary to the provisions of 8 U. S. C. A. 167(a), due to the lack of a fair inspection and examination as provided by the said statute, has been indicated in the case of *U. S. vs. Day* decided by the Circuit Court of Appeals for the 2nd Circuit, 20 Fed. 2nd 302. This case involved the construction of a statute of the United States involving immigration, and the question of the right of the Commissioner of Immigration to detain an alien seaman on board the vessel. The contention was that the inspector had not accorded a fair hearing as required by the statute. The court said:

"We think that the inspector must accord the seaman a fair hearing and give him the chance to show that he is landing as the statute requires. The record shows that in the case at bar the inspector did not do this. Relying upon the suspicious evidence of the manifest, his questions to the master and the letter to the department, he merely passed the suspected seamen before him in line and thereupon ordered their detention. Thus he deprived them of any opportunity to disabuse him of his suspicion and to prove their intention. *The detention was, therefore, unlawful* and the writ should have been allowed."

The very recent case of *McCarl vs. U. S.*, decided January 7, 1929, by the Court of Appeals of the Dis-



trict of Columbia and cited in 30 Fed. 2nd 561, indicates the construction given to 8 U. S. C. A. 167(a) by the Department of Labor and by the courts.

This case involved a writ of mandamus for the payment of a certain voucher issued by the Department of Labor as a refund on an immigration fine imposed under 8 U. S. C. A. 167(a). The facts reported in the opinion of the case, however, are pertinent here as showing the attitude of the Department of Labor itself in regard to fines imposed under this said section and the issuance of blanket detention orders.

The facts appear as follows: The S. S. "Marte" arrived at the port of New Orleans with a crew of seven officers, a steward and 23 bona fide seamen. Upon arrival, the master of the vessel was served by the U. S. immigration officer at the port with a written notice to detain on board all members of the crew except the officers and steward. The master diligently endeavored to comply with this order but notwithstanding his efforts, seven members of the crew made their way to the port and did not return. A report of this fact was duly made to the immigration officer but the vessel was granted clearance from the port of New Orleans without assessment of any penalty because of the escape of the seamen. The

vessel proceeded on her homeward voyage and called at the port of Norfolk, Va., at which port the master of the vessel was required to pay the sum of \$7,000 as a fine for his failure to detain the seven deserting seamen at New Orleans. In order to obtain clearance of the vessel, this sum was deposited under protest whereupon the vessel was allowed to depart. This sum was afterwards paid into the U. S. Treasury as an immigration fine. Later an investigation was made by the Commissioner General of Immigration and the Secretary of Labor and it conclusively appeared to them that the fine was collected through error of the government officers. Whereupon they authorized and directed that it be refunded, and a voucher was accordingly issued by the Department of Labor for the sum of \$7,000 as a repayment of the fine.

From the language of the opinion it appears that these above facts were contained in the complaint to which complaint the defendant answered, and plaintiffs demurred to the answer. Plaintiffs' demurrer was sustained. This case, and the one before this court, present similar facts and show inconsistent action by the Secretary of Labor in the construction of the same statute. (8 U. S. C. A. 167(a).)

In the case of *U. S. vs. National Surety Company*, 20 Fed. 2nd 972, Section 20 of the Immigration Act

of May 16, 1924, (8 U. S. C. A. 167) was involved. In this case the U. S. sought to recover fines levied against a steamship company for failure to detain on board certain alien seamen who had been ordered detained by the immigration officers. The language of the court in speaking of the Immigration Act is pertinent to this case. The court said:

“To my mind it is perfectly clear that the immigration officer, or the Secretary of Labor, shall determine the bona fides of the seaman, and if they determine any man or men to be non bona fide seamen, this is final, *if the examination was fair and proper*, and he must be detained on board or deported as ordered.”

### CONCLUSION

It is, therefore, the contention of the appellant in this case that the amended complaint alleges that the blanket detention order issued by the immigration officer pursuant to 8 U. S. C. A. 167(a), was unlawful and of no force and effect, due to the failure of the immigration officer to accord the alien seamen a fair and proper examination and inspection as provided by the said statute. That, therefore, the statute was not violated by the plaintiff, and the action of the Secretary of Labor in imposing the fines was an arbitrary and unlawful action involving a question of law as to the proper construction of 8 U. S. C. A. 167(a), and that this action by the Secretary

of Labor is, therefore, reviewable by the courts. Appellant earnestly contends, therefore, that the amended complaint does state facts sufficient to constitute a cause of action and that the lower court erred in sustaining defendant's demurrer on the ground that the said amended complaint did not state facts sufficient to constitute a cause of action, and, therefore, that the decree of dismissal subsequently entered by the lower court based upon the said erroneous order sustaining defendant's demurrer was not justified and was not according to law.

WHEREFORE, appellant prays that the decree of dismissal and the order sustaining the demurrer entered by the trial court be set aside and that the cause be remanded to the District Court for the Western District of Washington, Northern Division, with instructions to overrule the said demurrer which the lower court heretofore sustained.

Respectfully submitted,

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